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In the Supreme Court of the United States

OCTOBER TERM, 1963-4

No. 849

INLAND EMPIRE BUILDERS, INC., *et al.*, *Appellants*,

vs.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

No. 850

(Consolidated Appeals)

HEBB AND NARODICK, *et al.*, *Appellants*,

vs.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

No. 851

IAN MURRAY, *et al.*, *Appellants*,

vs.

THE STATE OF WASHINGTON, *et al.*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' CONSOLIDATED BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

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I.

COMMENTS ON APPELLEES' COUNTER-STATEMENT OF THE CASE

It is not intended in this brief to analyze factual questions in the detail appropriate for a full hearing. However, if certain unarguable facts about Capehart construction are kept in mind, the so-called "very complicated series of transactions" becomes quite simple. In their Counter-Statement of the Case, appellees extract a provision or a sentence from certain of the documents that the United States required to be executed

in these cases and fail to mention other provisions from the same documents that are pertinent to the questions presented by these appeals. In any event, it is the position of the appellants that all of the documents that are exhibits in this case must be treated and interpreted as a whole, as expressed by the dissent of the Washington Supreme Court:

> "Under the established rule for the construction of contracts, a contract must be picked up by its four corners and considered in its entirety. In so doing, it is inescapable to conclude other than that the prime purpose of the housing contract was the construction of military housing for the exclusive use of the United States. (Opinion of the Supreme Court of the State of Washington, Appendix A, pp. 17 and 18 to Jurisdictional Statements)

It is true, as stated on page 10 of appellee's Motion to Dismiss, the Military Departments left it up to the bidding contractors to obtain a commitment for the construction loan to finance the military housing, but it is a pure fiction to contend that the loans were made to the Capehart corporations or that they were secured by a mortgage on a leasehold granted by the United States to the Capehart corporations. The loan was made to the United States based upon the following undertakings of the United States in the Housing Contract:

> "Article XVI PAYMENT OF THE MORTGAGE NOTE
> (29) The Department shall to the extent that advances made against the mortgage note (identified in the Building Loan Agreement above referred to) have been approved by the Commissioner, make payments in accordance with the terms of said note, provided that this obligation to make payments

> shall not become effective until the Commissioner shall have finally endorsed said note for mortgage insurance, or upon the complete termination of the Housing Contract for the convenience of the Department prior to completion of the project." (Exhibit 8, page 8)

At the time of executing the Housing Contract, the United States also executes what is referred to as a Guaranty Agreement but what is in fact a direct agreement to repay the construction loan, as appears from the following provision thereof:

> "2. The Department will, subject to the conditions stated in the foregoing guarantee *(sic)* make each periodic payment becoming due to the mortgagee on said note in accordance with the terms thereof without any requirement that the mortgagee shall have made a prior demand to the mortgagor-builder for such payment." (Exhibit 16, page 1)

The lease agreement has *no right of possession or other benefit*, and therefore a mortgage on such a lease is without security. The lease, the note, the mortgage, and the creation of a corporation to serve as a straw man in executing these documents was solely a device to legally qualify this type of loan to the United States for the lending institutions involved. This function is described in the opinion of William P. Rogers, United States Attorney General, of October 22, 1959, at page A-7 of Appendix to Appellants' Brief, Tr. 0068:

> "*First*. The duplication of insurance by the Commissioner and guaranty by the Secretary is based on the consideration that, while, basically, Armed Services Housing constitutes a responsibility of the Department of Defense, mortgages in-

sured by the Federal Housing Administration can be financed relatively easily because virtually all states have legislation making them legal investments for banks and similar institutions. The enactment of state legislation making mortgages insured by the Federal Housing Administration can ments throughout the nation, and thus generally financially acceptable to institutional investors, probably would have taken five years, to judge from past experiences. In these circumstances it appeared desirable that Armed Services Housing mortgages should carry the customary insurance by the Federal Housing Commissioner as well as a guaranty by the Secretary of Defense."

The contractor, as part of his construction costs, paid $1,000.00 to the corporation for purchase of its stock, which $1,000.00 was immediately paid to the United States as rental under the illusory lease. The corporation then is a shell, having neither funds, a beneficial interest in the lease nor any possibility of benefit from any portion of the transaction. It is prohibited by the contract documents from making a profit.

Although the stock is issued in the name of the contractor, such contractor is deprived of all incidents of ownership prior to any construction when, pursuant to the contract document requirements, he endorses the stock in blank and places it in irrevocable escrow for delivery to the United States under any contingency. The escrow agreement provides for disposition of the stock as follows:

"Delivery by the depository to the Department (I) upon receipt of written notice from the Federal Housing Commissioner that he has issued the Determination of Completion . . . or (II) upon

> written notice . . . that said Housing Contract has been completely terminated for the convenience of the Department, whichever event first occurs." (Exhibit 11, page 2)

There is no condition under which such stock ever could revert to the contractors.

In Paragraph 11, page 14, appellees state that the guaranty executed by the United States was to the mortgagee only. In fact, the agreement to repay the construction loan was made directly by the United States with the contractor in the construction contract, as above quoted, and this agreement by the United States supplied the sole consideration upon which the entire transaction rested.

With reference to payments to the contractor from the mortgage proceeds, it is particularly significant that although such applications are nominally processed by the Capehart corporation, the only approval required is that of the Contracting Officer on behalf of the United States, the lending institution and the FHA Commissioner. The following is quoted from the Housing Contract:

> "(7) * * * * The sum to which the eligible builder shall be entitled upon any such payment shall be the total of the purchase price . . . of uninstalled acceptable materials suitably stored on the mortgage property in a manner *acceptable to the Contracting Officer*, plus the cost of the portions of the work acceptably completed, *as approved by the Contracting Officer*, computed in accordance with . . ." (emphasis supplied) (Exhibit 8, p. 3)

The contract further provides:

> "Paragraph 14 — PAYMENTS TO ELIGIBLE BUILDER
>
> "a. The eligible builder shall submit to the Contracting Officer his application for each payment on FHA form 2448 and as agent for the mortgagor-builder, shall submit to the Contracting Officer FHA form 2403 . . .
>
> "b. When the eligible builder has made proper application for payment as provided for in this Housing Contract, the Contracting Officer shall promptly process such application within a reasonable time, giving the eligible builder notice of action taken by the Contracting Officer on each such application of the eligible builder.
>
> "c. *The title to all material and work covered by progress payments made shall thereupon vest in the Department,* . . . (emphasis supplied) (Exhibit 8, p. 18)

Likewise on page 12 of their Motion to Dismiss, appellees specify only a few provisions of the Housing Contract (Ex. 8). No mention is made by appellees of the fact that the Housing Contract contains all of the normal provisions required of public contracts with the United States, including the "officials not to benefit" provision, the Buy American Act, the Convict Labor provision, the non-discrimination in employment provision, the eight-hour law provision, the labor and apprentice provision, the Copeland (anti-kickback) Act provision, the utilization of small business concerns provisions and provisions subjecting the contractor to renegotiation as required by Section 104 of the Renegotiation Act of 1951 (Ex. 8, pp. 20 through

27). Article XIV, paragraphs 22 and 23, provide that each housing unit is to be placed under the control of the United States upon determination by the Contracting Officer and the Commissioner that each such unit is available for occupancy. Article XX, paragraph 34, provides that all items that remain personal property acquired or manufactured by appellants shall be deemed to be acquired for resale or manufactured for sale to the United States.

On page 16 of Appellees' Brief and the fold-out attached, they attempt to raise an inference that the private funds of occupying military personnel are used to make the mortgage payments, from which it would presumably be argued that public funds are not actually involved. We quote from the statute involved, which should dispel any such inference:

> "42 USC 1594d, 69 Stat. 653—Appropriations; use of quarters allowances
>
> "(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of Sections 1594-1594c of this title.
>
> "(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section. Aug. 11, 1955, c. 783, Title IV, Sec. 407, 69 Stat 653."

Obviously, the loans have to be repaid whether the housing is occupied or not. If occupied, the occupants are not entitled to a quarters allowance because the government is supplying them quarters, and the funds

otherwise allocated to quarters allowance *may be* used to pay the mortgage loan. In any event, the loan payments must be made directly by the United States from its own funds.

In essence, then, the United States borrows funds from private lenders to construct military housing, and uses a straw man corporation, a lease and mortgage which are nominal only, insured by the Federal Housing Administration, for the sole purpose of enabling the lenders to legally make the loan. The entire transaction is completely controlled to the last detail by the United States, and only the United States, through the contract documents and the authority of the contracing officer representing the Military Department involved.

II.

WHETHER OR NOT THE UNITED STATES IS THE "BUYER" IS A FEDERAL CONSTITUTIONAL QUESTION

Appellees contend that the question involved as to whether the United States is the "Buyer" of the military housing constructed by appellants is essentially a question of state law and not a federal question. The argument appellees advance in support of this contention, however, goes basically to the merits of the question and not to its characterization as either a state or a federal question. The argument of appellees is in substance that the Washington Supreme Court was clearly correct in deciding that the United States was not the "buyer" and conclude that therefore no federal question is presented.

It is not our purpose here to argue the merits of the question as appellees have done, but to demonstrate that a federal constitutional issue of substantial importance exists and that it is incumbent upon this Court to determine for itself the facts and constructions upon which it rests.

Both appellees and the Washington Supreme Court reached the conclusion that the United States is not the "buyer" of the military housing constructed by appellants by attempting to force these cases into the mold of *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.ed. 3, 62 S.Ct. 43 (1941). In its opinion the Washington court stated:

> "We must therefore determine who is the buyer under the facts of the instant case. In this regard, appellants contend that the United States is the buyer because it bears the economic burden of paying for the military housing, by virtue of its guarantee of a mortgage obligation." (Opinion of the Supreme Court of the State of Washington, Appendix A, page 8 to Jurisdictional Statements)

The state court in effect answered the question presented by appellants by phrasing it in this manner so that the ruling of *King & Boozer* would be clearly applicable. Appellants do not dispute that *King & Boozer* stands for the proposition that the fact that the economic burden of a state tax may be borne by the United States does not render the tax thereby invalid.

But appellants have never and do not now contend that the United States is the "buyer" *merely because it bears the economic burden of the taxes in question*. Appellants' position as to the merits of the question is

that a proper determination and construction of all of the facts and exhibits in these cases will result in a finding that the United States is the "buyer" and that the mortgagor-builder corporations are not, for the United States *alone* determines the need for the military housing, prepares the plans, issues bids for the work, contracts with the acceptable bidder by accepting his bid, pledges its credit and agrees to pay the mortgage loan so that private mortgage money can be obtained during the construction period, takes title to the housing units as progress payments are made, takes possession of the housing units as they are available for occupancy and exclusively uses the same, and pays the promissory note of the private lender in accordance with its terms without any prior demand.

In an attempt to characterize this question as a question of state law, appellees quote certain language from *King & Boozer* on pages 20 and 21 of their Motion to Dismiss. In part, that quotation read: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Appellants have already shown in their Jurisdictional Statement that this precise language was explained and clarified by this Court in the subsequent case of *Kern & Limerick, Inc. v. Scurlock*, 347 U.S. 110, 98 L.ed. 546, 74 S.Ct. 403 (1954) as follows at page 121 of U.S.:

> "Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it shows, even though it arbitrarily eliminated an ex-

> empt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction."

In that case the determination by the Arkansas Supreme Court that the United States was not the purchaser was reversed by this Court. Appellees continue to rely upon the language quoted above from *King & Boozer* and ignore that explanation and clarification made of that language by this Court in the *Kern-Limerick* case. While the language quoted by appellees from *King & Boozer* does not support their assertion that only a question of state law is involved, the decision in *Kern & Limerick* by this Court does support appellants' position that a federal constitutional issue exists and that it is for this Court to determine under all of the facts of these cases whether the United States is the "buyer" of the military housing constructed by appellants.

The Washington Supreme Court determined as a question of state law that the "buyer" and not the "consumer" is the person responsible under the Washington sales tax statute for payment of the sales tax (Opinion of the Washington Supreme Court, Appendix A, pages 7 and 8). Appellants do not dispute that the Washington Supreme Court has the exclusive authority to determine such a question, but it cannot speak with final authority on the question of who is the

"buyer" where the United States is involved, for the decision in *Kern & Limerick* established that the ultimate determination of such a question is for this Court.

In the present case, this Court could find that the transaction occurred in three forms, any one of which would result in the application of sovereign immunity. Either the United States was the direct purchaser, or it purchased through the Capehart corporation, acting as a federal agent, or the Capehart corporation made its purchase in the status of a federal instrumentality. Each of these interpretations could arise from the application of the cases and arguments presented in the jurisdictional statements of the appellants as well as in this reply brief.

III.

THE PROTECTION OF THE SOVEREIGN IMMUNITY OF FEDERAL INSTRUMENTALITIES ALWAYS PRESENTS A SUBSTANTIAL FEDERAL QUESTION

On page 22, appellees argue that there can be no bona fide claim that the Capehart corporations are federal instrumentalities because:

1. They are not able to obligate the credit of the federal government.

2. The appellants formed the Capehart corporations for their own purposes.

Even if these conditions were true, they would not be fatal to entitlement to sovereign immunity in the circumstances of this case. However, neither of the contentions is supportable.

With reference to assertion 1, the simplest answer is that the credit of the United States is already fully and unconditionally obligated, subject only to the contractor's faithful performance of its obligations as in the case of any other government purchase contract. The obligation first arises upon the issuance by the United States of the acceptance of the contractor's bid (long before the Capehart corporation is formed) and is renewed in the Housing Contract itself. As previously stated, at the time of executing the Housing Contract, and in performance of its repayment obligation set forth in that contract, the United Sates issues to the lending institution its "guaranty." This "guaranty" has been described in a Senate Report quoted in the October 22, 1959 Opinion of William P. Rogers, United States Attorney General, as follows:

> "S. Rept. 231, 85th Cong., 1st sess.
>
> "'. . . a mortgage as secure as a United States Government bond in practically every respect. This security is based on the fact that the Secretary of the respective service gives the lender an unconditional written guaranty of all mortgage payments. With this guaranty by the Federal Government, acting through the Secretary of the Air Force, Army, or Navy, as the case may be, the FHA insurance of the mortgagee becomes unimportant. This guaranty by the Government places the credit of the United States behind these mortgages.'"[1] (Appendix p. A-16 to Appellant's Brief, Tr. 0068)

[1] See also the extension of remarks of Representative Collier (105 Cong. Rec. (Daily Ed., May 13, 1959), A4156, 4157) pointing out that the repayment of the mortgage "is unqualifiedly and absolutely guaranteed by the U.S. Government," and that a guaranteed mortgage constitutes a "truly direct obligation" of the United States.

Appellees find themselves in an anomalous position. They contend that the Capehart corporation is purchasing the housing from the contractor, and that it is the Capehart corporation that disburses the mortgage proceeds to the contractor in payment for work performed. These payments can be made only upon approval of the mortgagee, the Contracting Officer and the FHA Commissioner under Article IV of the Housing Contract, upon which event the United States becomes obligated to repay such advances, under the guaranty agreement and Article XVI of the contract. Even under appellees' theory, then, the Capehart corporation makes the advances which the United States immediately becomes obligated to repay. How more clearly could the credit of the United States be obligated.

The second point made by appellees is even less sustainable; that the appellants formed the mortgagor-builder corporations for their own purposes. Appellees have apparently abandoned the position they took before the Washington Supreme Court to the effect that the mortgagor-builder corporations had purposes of their own. In its decision, the Washington Supreme Court implied that the mortgagor-builder corporations did have purposes of their own as well as those of the United States (Opinion of the Supreme Court of the State of Washington, Appendix A, page 12; cf. the dissent, Appendix A, pages 23 and 24). If there is anything clear in the facts of these cases, it is that the United States conceived the entire financing arrangement for Capehart Act military housing and required appellants by contract to comply with the scheme in every detail, including the formation of the mortgagor

builder corporations and their sole purpose and function was expended and completed upon execution of the various documents required by the United States to accommodate the financing methods determined by the United States. The United States even supplied forms of the Articles of Incorporation and the By-Laws of the mortgagor-builder corporations. Appellant had no more interest or use for the mortgagor-builder corporations than they had for the military housing units they constructed. It would hardly be argued that the military housing was private housing because the contractor hoped to make a profit in constructing it for the United States.

The purpose of the mortgagor-builder corporations is a completely federal one and the benefits derived from the utilization of financing agents of this type extend to the public and not to the appellants.

Appellees have advanced their argument in an attempt to bring the mortgagor-builder corporations within the distinction made by Justice Holmes in *Clallam County v. United States*, 263 U.S. 341, 68 L.ed. 328, 44 S.Ct. 121 (1923), where, in sustaining the status of a private corporation as a federal instrumentality, it was stated at page 345 of U.S.:

> "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends."

The conclusion of the dissenting opinion in the decision of the Washington Supreme Court in these cases with

regard to the status of the mortgagor-builder corporations is correct:

> ". . . it [the mortgagor-builder corporation] was nothing more than an instrumentality of the United States government; that it had no commercial purpose other than for the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the federal government applies." (Opinion of the Supreme Court of the State of Washington, Appendix A, page 24, Jurisdictional Statements).

The only difference between these cases and the *Kern & Limerick* case and that of the *United States v. Livingstone*, 179 F.Supp. 9; affd. *per curiam* 364 U.S. 281, 4 L.ed.(2d) 1719, 80 S.Ct. 1611 (1960) is that in these cases the United States is obligated to repay the lending institution rather than the purchasing agent, but the obligation of government funds is identical in all three cases and title vested immediately in the United States in all three cases.

IV.

THE UNITED STATES WAS NEVER DIRECTLY OBLIGATED TO THE VENDORS IN THE *LIVINGSTONE* CASE

On page 25 of their Motion to Dismiss, appellees seek to distinguish the *Livingstone* case by asserting that in that case the United States was directly obligated to the seller. The case involved the application of the South Carolina sales and use taxes to purchases made by DuPont in the operation of the Savannah River project for the Atomic Energy Commission. The same

question was involved in that case as here for the court stated:

> "* * * Here the sole question is whether or not the United States is the real purchaser and user of the purchased articles so as to make their purchase and use immune from state taxation. That question arises under the Constitution of the United States and its answer is not dependent upon the resolution of any question of state law. * * * " (179 F. Supp. 9 at page 12)

But there is nothing in the *Livingstone* case to indicate that the United States was ever directly obligated to any seller. DuPont was authorized to make purchases under the terms of its contract with the United States and it was to be reimbursed for all of its costs and expenses, for the purpose of which the contract provided for a revolving fund to be deposited by the United States with certain banks. DuPont was authorized to draw against such funds in payment of purchases and expenses.

No one can dispute that DuPont is a private corporation, privately owned, and having purposes of its own. Yet, under the contract in the *Livingstone* case, the court concluded that it was merely acting as an agent for the United States in its procurement activities, despite the fact that the contract did not designate it specifically as an "agent" for this purpose.

In the quotation from the *Livingstone* case set forth by the appellees on page 25 of their Motion, the following sentence appears:

> "This type of contract, and the substantive relation of the parties, made it all the more appropriate

> that the contract required that title to all goods and materials purchased should pass directly from the vendors to the United States."

As we have previously indicated, the Housing Contract in these cases provided:

> "(c) The title to all material and work covered by progress payments made shall thereupon vest in the Department. . . ." (Exhibit 8, page 18)

The *Livingstone* case noted:

> "DuPont's credit was not to be advanced or risked."

In the present case, the Capehart corporation has no credit which could be advanced or risked. The successful completion of the construction was assured by performance and payment bonds, the surety on which were subject to approval of the United States, and the construction was performed on the contractual commitment of the United States to repay the construction costs.

Again from the *Livingstone* case at page 21:

> "Its disclosures in its requests for quotation in its purchase orders that the goods were being procured for the United States, to whom title would directly pass, and its imposition of the terms required of public contracts with the United States, negatived any individual liability of its own."

In the present case, the fact that the housing is for the United States permeates the entire transaction. Unlike the DuPont purchases which could be made in amounts under $10,000 without even approval of the Atomic Energy Commission, the United States in this case was a party to the actual purchase agreement with

the contractor. As previously pointed out, the present contract also contained all of the provisions required of public contracts with the United States.

Appellees argue that the construction funds paid over to the contractor in the present case are not public funds. We assert that funds borrowed exclusively in reliance on the credit of the United States can never be anything but public funds, usable only for public purposes.

Finally, appellees urge that DuPont Company had as its sole and exclusive purpose the serving of the United States whereas the Capehart corporations were serving the contractor as well. We have previously commented on what we deemed to be the illogic of this contention and further suggest that in terms of national prestige and good will, DuPont was accomplishing an individual business purpose. However, the so-called benefits or purposes in either case, even if found to exist, are much too incidental to destroy the status of each entity as an agent of the United States.

V.

THERE IS A FUNDAMENTAL CONFLICT IN THE OPINIONS OF THE SUPREME COURTS OF THE SEVERAL STATES CONCERNING THE CAPEHART ACT HOUSING

On pages 26 to 29 of their Motion to Dismiss, appellees contend that the cases cited by appellants in their Jurisdictional Statement are distinguishable because they involve the application of state sales statutes different from the Washington statute. In the Jurisdictional Statement submitted by appellants, its is pointed

out why the decisions in *Green v. Kaiin AFB Housing, Inc.*, 104 So.(2d) 463, and *Knapp-Stiles, Inc. v. Michigan Department of Revenue*, 370 Mich. 329, 122 N.W. (2d) 642 (1962), striking down the application of state sales tax statutes to Capehart Act construction are here applicable. Those Jurisdictional Statements also point out why the majority decision in the case of *Silberblatt, Inc. v. Tax Commission of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, regarding the status of the mortgagor-builder corporations, is in error. In that majority decision, the New York Court of Appeals said:

> "They were created for a commercial purpose for private profit, as distinguished from a governmental purpose." (159 N.E.(2d) 195 at page 198)

Appellants have shown that the mortgagor-builder corporations were required by the United States, that they had no commercial purpose but were formed solely to perform the financing function desired by the United States, and that they were expressly prohibited from making any profit whatsoever. The dissenting opinion in the *Silberblatt* case was correct, just as the dissenting opinion in these cases stated:

> "An analysis of *In re S. S. Silberblatt, Inc. v. Tax Comm. of the State of New York*, 5 N.Y. (2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), cited by the majority, discloses that the opinion is based on the erroneous premise that the Delaware corporations were '. . . created for a commercial purpose for private profit, as distinguished from a governmental purpose.' As heretofore stated, consideration of the housing contract in its entirety cannot support such a conclusion.

The analysis of the housing contract and the reasoning of the dissent in the *Silberblatt* case is correct." (Opinion of the Supreme Court of the State of Washington, Appendix A, page 22, Jurisdictional Statements).

VI.

THERE IS AN IRRECONCILABLE CONFLICT IN FEDERAL COURT DECISIONS INVOLVING CAPEHART HOUSING

On page 29, appellees state that recent Federal Court decisions support the majority decision below and cite only two of the at least five Federal District and Circuit Court decisions relating to Capehart housing, all of which involve proceedings related to the payment bond of the contractor.

We shall cite three federal cases which are in direct conflict with the cases cited by appellees. Appellants have not felt that any of these cases were sufficiently relevant to be of assistance in determining the present issues, but in total they support the position of the appellants herein with the possible exception of *United States v. Harrison & Grimshaw Construction Co.*, 305 F.(2d) 363, which is demonstratively in error.

In *Autre v. Williams and Dunlap*, 185 F.Supp. 802, 1960—D.C., W.D. La., the court held that the Miller Act and the Capehart Housing Act were harmonious and "that the congressional intent was and is that only one bond be required for construction of a public building as contracted" for purposes of vesting federal jurisdiction.

In *Lasley v. United States*, 285 F.(2d) 98, 1960—

C.A. 5, the court of appeals referred to the bonding provisions of the Capehart Act, to-wit:

42 U.S.C.A. Sec. 1594 Subsection (a)

"* * * Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and *the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40*, and no additional bonds shall be required under such section * * *" (Emphasis added)

Title 40, U.S.C. Sec. 270a is, of course, the Miller Act. The appellant in that case argued that since the bonds in controversy were not executed pursuant to the Miller Act and since a similar jurisdictional provision is not contained in the Capehart Act, the District Court did not have jurisdiction. The court held at page 100:

"We think it clear that Congress considered that but for the provisions of the Capehart Act, quoted above, a contractor would be required to supply a builder with a Miller Act bond before entering upon a Capehart construction job, because such a project falls within the language 'construction . . . of any public building or public work of the United States;'"

In *United States v. Ft. George G. Meade*, 186 F.Supp. 639, (1960—D.C. Md., the court also refers to the quoted statutory language and concludes at 645;

"This language, although indicating that Capehart Housing Projects would otherwise come within the provisions of the Miller Act, by providing

that a payment bond furnished pursuant to section 1594(a) constitutes 'a sufficient compliance' with the provisions of the Miller Act . . ."

and then determines that the quoted provision supersedes the Miller Act as to Capehart Housing. The court finally concludes, consistent with the above-cited opinions, that the provisions of Section 1594(a) of Title 42 requiring the furnishing of a Capehart payment bond and providing it shall be deemed a sufficient compliance with the provisions of Section 270a of the Miller Act incorporate by reference the provisions of Section 270b of the Miller Act, permitting suit in Federal court. The court particularly states in effect that if there is a lienable interest, such interest does not render "the housing project in question something other than a public work."

In *Robertson Lumber Company v. Progressive Contractors*, 196 F.Supp. 171 (1961—D.C. N.D.), the court followed the above decisions in holding that a Capehart corporation was a public project and the court therefore had jurisdiction under the Miller Act.

Appellants certainly do not want to be diverted to an argument on the issues involved in these cases, but cite them only in contravention to appellees' assertion that they support a characterization of the Capehart project as a private enterprise. Note that in *United States v. Ft. George G. Meade*, where the court cites an unreported decision as authority for the possible existence of a lienable interest, it further observes that the court also observes "the government, by such sale could not be deprived of its paramount right to the use and control of the property" for the obvious reason

that the Capehart corporation has nothing which could be sold. The court later observes that such a lien "is of importance only as a means of leverage to force payment to a supplier . . ."

United States v. Harrison & Grimshaw Construction Co., 305 F.(2d) 363 (1962), C.A.-10, has come to an incorrect decision because it has misconstrued the facts. It carefully cites the case of *Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563, 4 L.ed.(2d) 1554, as stated:

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>
> "The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it."

but it overlooked the crucial observation in that case, to-wit:

> "While the Government was obliged to make progress payments based on the percentage of the work completed, nothing in the contract provided that ownership of the portion of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property."

We can only assume that the provision of the construction contract heretofore quoted in this brief as vesting title in all construction and even in material delivered to the site in the United States was not pointed out to the court in the *Harrison & Grimshaw* case. Had the court of appeals observed this provision, it presumably would have come to an opposite result from the very rationale and observation of the *Armstrong* case upon which it relies.

It can be seen that the confusion in the foregoing cases renders them of slight assistance in the present controversy, but if anything, the surmounting proposition is that Capehart construction is part of the public works of the United States, a fact which the mere reading of the contract establishes beyond dispute.

VII.

THE CONTINUED EXISTENCE OF SOVEREIGN IMMUNITY FOR FEDERAL INSTRUMENTALITIES PRESENTS AN ISSUE OF FUNDAMENTAL IMPORTANCE

Contrary to the assertion of appellees on pages 31 and 32 of their brief, four state supreme court opinions involving questions of tax liability arising out of Capehart construction have considered the status of Capehart corporations as federal agents or instrumentalities of sufficient importance to such decisions to warrant extensive analyses of the issue. The conflict in application between the *Eglin AFB Housing* and the *Knapp-Stiles* cases on the one hand, and the *Silberblatt* and present case on the other, demonstrates the uncertainty which attends the application of this doctrine.

The importance and significance of the present case does not arise solely from the amount of tax liability involved or from its impact on present or future Capehart type situations. The importance and significance of this case is that unless it is reversed, the doctrine of sovereign immunity of federal instrumentalities, as announced in *McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 159, defined in *Clallam County v. United States*,